STATE OF MICHIGAN

COURT OF APPEALS

RAMCO HARTLAND L.L.C., RAMCO RM HARTLAND SC L.L.C., RAMCO RM HARTLAND DISPOSITION L.L.C.,

Plaintiffs-Counter-Defendants/Appellees,

v

LANDMARK/MANSOUR DEVELOPMENT L.L.C.,

Defendant,

and

HANI MANSOUR,

Defendant-Counter-Plaintiff/Appellant.

UNPUBLISHED
February 8, 2011

No. 294877
Oakland Circuit Court
LC No. 2008-093556-CK

RAMCO HARTLAND L.L.C., RAMCO RM HARTLAND SC L.L.C., RAMCO RM HARTLAND DISPOSITION L.L.C.,

Plaintiffs- Counter-Defendants Appellants,

v

LANDMARK/MANSOUR DEVELOPMENT L.L.C.,

Defendant/Appellee,

and

No. 294890
Oakland Circuit Court
LC No. 2008-093556-CK

HANI MANSOUR,

Defendant-Counter-
Plaintiff/Appellee.

Before: TALBOT, P.J., and SAWYER and M.J. KELLY, JJ.

PER CURIAM.

These consolidated appeals involve a dispute regarding a real estate development contract. Hani Mansour, the assignee of Landmark/Mansour Development L.L.C., appeals the trial court's grant of summary disposition in favor of Ramco Hartland L.L.C., Ramco RM Harland SC L.L.C., and Ramco RM Hartland Disposition L.L.C. (hereinafter referred to jointly as "Ramco") on Mansour's countercomplaint for breach of contract, declaratory judgment and fraud/misrepresentation. Ramco also appeals the trial court's dismissal of its complaint for breach of contract, promissory estoppel and declaratory judgment, regarding this same contract. We affirm.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo.[1] When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party.[2] The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.[3] This appeal also involves the interpretation of a contract, which we also review de novo.[4]

In 2007, Ramco Hartland and Landmark/Mansour entered into a purchase agreement involving real property for possible commercial development. In addition to the purchase agreement for the property, the parties signed a letter of agreement (hereinafter the "contract"), which delineated how the parties would proceed. If Ramco, "in its sole discretion," decided not to proceed with the development and sold the property to a third-party without retaining an interest, any remaining agreements between Ramco and Landmark/Mansour would be deemed "null and void" with both parties having "no rights or claims hereunder."

In the alternative:

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[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[2] MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006).

[3] *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

[4] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

> If, however, [Ramco] elects to proceed with the development of the Project, then *at such time as [Ramco] consummates a construction loan for such development*, [Ramco] and . . . [Mansour] shall form a new limited liability company (the "Company") and [Ramco] shall contribute the Development Site to the Company, which shall then become the borrower under the construction loan and the developer of the Project. [Emphasis added.]

Should this option be exercised, the parties were to enter into an Operating Agreement that "shall include" eight specifically delineated conditions pertaining to the parties' respective percentage of interest in the development, capital contributions, guarantees, etc. and a ninth catch-all provision indicating the inclusion of "such other terms, conditions and provisions as are typical in similar types of agreements." A provision was also placed into the contract that dealt with the rights of the parties should they be unable to agree on the terms of the Operating Agreement, hereinafter referred to as the "No Agreement Clause." It is this provision that is at the center of this dispute.

Specifically, the underlying claims for breach of contract by both parties concern the language of the No Agreement Clause, to wit:

> The foregoing notwithstanding, in the event that, for any reason, [Ramco] and [Mansour] are unable to agree upon the terms of the Operating Agreement such that the Operating Agreement is in final form and is executed at the time of the consummation of the construction loan described above, then, in lieu of [Mansour] obtaining the membership interest described herein, [Mansour] shall receive the amount of One Million Dollars ($1,000,000) at the time of first funding of such construction loan; the Company shall not be formed, and the parties shall have no further liability to each other hereunder.

It is undisputed that the parties were unsuccessful in negotiating the terms of an Operating Agreement and that such an agreement was never executed. The trial court granted summary disposition in favor of Ramco on Mansour's claim for breach of contract finding, "[u]ntil such time as a construction loan is obtained, the condition precedent has not been satisfied, and the money is not yet due under the terms of the Agreement."[5] Summary disposition was also entered in favor of Mansour on Ramco's breach of contract claim, which was premised on a contention that Mansour was obligated to sign an Operating Agreement. The trial court, using the contract language, ruled, in relevant part:

> [T]he contract only required [Mansour] to sign an Operating Agreement once the parties reached an agreement on the terms. The contract between the parties clearly contemplated that they would not be able to reach an agreement. Thus,

[5] The trial court rejected Mansour's request for a declaratory judgment "for the same reason."

> there cannot be a claim for breach of contract where the parties have agreed only to negotiate, and cannot agree on the final terms.[6]

Ramco's claim of promissory estoppel was precluded due to the existence of an express contract. Mansour's assertion of fraud/misrepresentation was similarly rejected by the trial court because the existence of the contract negated the "tort claim absent a duty separate and distinct from the contractual relationship."

Effectively, the provisions of the contract that are relevant to this dispute are opposite sides of the same coin. In one set of circumstances where everything proceeds smoothly and Ramco decides to proceed with the development project and obtains a construction loan, the parties would form a new limited liability company. Ramco would then contribute the real property to the company and the parties would enter into an operating agreement that assured Mansour's receipt of a ten percent "membership interest" in the newly formed company. In contrast, if Ramco decided to proceed with the project but negotiations with Mansour fail to result in an operating agreement and the new company cannot be formulated, Mansour would lose his "membership interest" and "in lieu" thereof Mansour would receive the sum of one million dollars "at the time of first funding of such construction loan." Because it is undisputed that the parties failed to agree on terms for the Operating Agreement and the new limited liability company could not be formed as originally envisioned by the contract, the issue then becomes not whether Mansour is entitled to one million dollars, but rather when this amount would be owed or payable.

Simply, Ramco contends that because it has obtained only mezzanine loans and not a construction loan, the condition precedent for payment has not been triggered. Mansour argues that regardless of the name or description you apply, the mezzanine loans obtained by Ramco are for all practical purposes construction loans because they have been used to improve the real property, even if no vertical or building construction has yet occurred. Unfortunately, the contract fails to define this term and the trial court did not fully explain its reasoning, referencing only the affidavit of Ramco's president but not addressing the mezzanine loan documents submitted by Mansour. In the trial court, Ramco provided the affidavit of its president to distinguish what constituted a construction loan and how it differentiated from a mezzanine loan. Mansour responded by producing documents that indicated the mezzanine financing procured, of approximately $17,000,000, was used to improve the real property and, thus, based on the use of these funds constituted construction loans. Notably, the contract indicates that "consummate[ing] a construction loan" is the condition precedent not the obtaining of any type of loan for purposes of construction. Whether actual construction is initiated or undertaken is irrelevant for purposes of the contract provision.

Typically, this Court gives "contractual language its plain and ordinary meaning, avoiding technical and constrained constructions."[7] Yet, the rules of contract interpretation also

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[6] Based on this same reasoning, the trial court dismissed Ramco's request for a declaratory judgment.

recognize that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field."[8] As the parties to this transaction used the expertise of attorneys and are, themselves, sophisticated with regard to real estate transactions we look to the definitions of "construction loan" and "mezzanine loan" as used within the investment and real estate industry.

> A "construction loan" is defined as a:
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> Short-term real estate loan to finance building costs. The funds are disbursed as needed or in accordance with a prearranged plan, and the money is repaid on completion of the project, usually from the proceeds of a mortgage loan. The rate is normally higher than prime, and there is usually an origination fee. The effective yield on these loans tends to be high, and the lender has a security interest in the real property.[9]

In contrast:

> A mezzanine loan in the real estate industry typically refers to debt that is secured solely by the mezzanine borrower's indirect ownership of the mortgage borrower-the entity that actually owns the income producing real property. This same underlying real property also serves as collateral for the senior mortgage lender. [¶] *In a mezzanine loan, neither the mezzanine borrower nor lender actually holds any direct real property interest in the underlying land serving as collateral.* Rather, their respective interests are derived solely from the mezzanine borrower's (direct or indirect) ownership of the equity in the underlying mortgage borrower. The mezzanine borrower grants to the mezzanine lender a lien on its equity in the mortgage borrower pursuant to a written instrument (typically a security agreement), and thereafter the mezzanine lender holds an effective lien on the collateral at least vis-à-vis the mezzanine borrower. [¶] ... [¶] Since the mezzanine lender's collateral is equity in another entity, the collateral is technically personal property . . . .[10]

In other words, "a mezzanine loan . . . is secured not by the real property itself, but by stock of or some ownership interest in the company that owns the real property."[11] In the area of real estate

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[7] *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 471; 688 NW2d 523 (2004).

[8] *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005), citing 2 Restatement Contracts, 2d, ch 9, § 202, p 86.

[9] AllBusiness, Business Dictionary http://www.allbusiness.com/glossaries/constructional-loan/4950173-1.html (accessed January 20, 2011).

[10] *Greenlake Capital, LLC v Bingo Investments, LLC*, 185 Cal App 4th 731, 741-742; 111 Cal Rptr 3d 82 (2010) (emphasis in original).

[11] *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 307 n 1; 926 NE2d 1202, 900 NYS2d 698 (2010).

finance, a mezzanine loan is typically "used by developers to secure supplementary financing for development projects . . . in cases where the primary mortgage or construction loan equity requirements are larger than [ten percent]."[12] The use of the monies obtained through either type of loan for construction purposes is not dispositive with regard to whether they meet the definition of a "construction loan." Based on the technical distinctions inherent in the definitions, the trial court correctly determined that Ramco had not obtained a construction loan, rendering the condition precedent unsatisfied and precluding Mansour's breach of contract claim. Contrary to Mansour's stated position, there is a distinction, factually and legally, between having obtained a "construction loan" and procuring a loan used to perform construction. As noted by the trial court, the resolution of this claim necessarily precludes Mansour's request for a declaratory judgment.

Mansour also contends that the trial court erred when it granted summary disposition in favor of Ramco on his claim of fraud/misrepresentation. The elements for fraud in the inducement and misrepresentation are the same:

> (1) defendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage.[13]

To be actionable, any alleged fraud or misrepresentation must have been separate from any contractual promise.[14]

Mansour's fraud claim is clearly premised on his allegation that Ramco represented that, if it elected to develop the property, Mansour would receive a ten percent interest in the development company. Mansour also alleges that Ramco represented that Mansour would be entitled to $1,000,000 in the event that the parties could not agree on an Operating Agreement. Neither of these promises or representations is distinct or separate from those contained within the contract. In fact, one of the primary purposes of the contract is to describe these promises in detail. Mansour's claim of fraud is virtually indistinguishable from the promises he alleges were breached within the contract. Because any "alleged misrepresentations regarding the terms of

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[12] USLegal, Legal Definitions http://definitions.uslegal.com./m/mezzanine-capital%20/ (accessed January 20, 2011).

[13] *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

[14] See *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956); *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).

written documents that are available to the [party] cannot support the element of reasonable reliance"[15], the trial court properly dismissed Mansour's claim of fraud.

Finally, Ramco contests the trial court's dismissal of its breach of contract claim against Mansour. Specifically, Ramco argues that Mansour breached the contract by failing to negotiate in good faith and refusing to sign the Operating Agreement. "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement."[16] As observed by the trial court, the parties clearly considered the possibility that they would not reach a consensus on the terms of an operating agreement and included the No Agreement Clause to govern such a situation. To accept Ramco's contention that Mansour was required to sign the Operating Agreement would be contrary to the language of the contract and result in rendering the entire No Agreement Clause meaningless. Similarly, we find no error in the trial court's dismissal of Ramco's promissory estoppel claim as "[p]romissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract."[17] As Ramco conceded that it entered into a contract with Mansour, its claims of promissory estoppel and request for declaratory judgment, premised on the alleged breach of contract, are without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly

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[15] *Cummins v Robinson Twp*, 283 Mich App 677, 698; 770 NW2d 421 (2009) (citation omitted).

[16] *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

[17] *Gen Aviation, Inc v Cessna Aircraft Co*, 915 F2d 1038, 1042 (CA 6, 1990) (internal quotation marks and citation omitted).